Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02()–39 OF 2009(A) AND 02–43 OF 2009(A)
ALAUDDIN PCA, HASHIM YUSOFF AND MOHD GHAZALI FCJJ
16 FEBRUARY 2011

Contract — Construction — Terms of contract — Joint venture agreement — Whether appellant's entitlement to receive payment of proceeds from development scheme was to be deferred and not immediate — Whether JVA subject to and governed by provisions of Housing Developers (Control and Licensing) Act 1966

The appellant and two other companies, namely U-Meng Corp Sdn Bhd and U-Meng Holdings Sdn Bhd ('the U-Meng companies'), were landowners that entered into a joint venture agreement ('the JVA') with the defendant, a licensed housing developer, to develop their lands ('the development scheme'). Clause 2.3.1 of the JVA provided that the appellant and the U-Meng companies as landowners were entitled to receive 25% of all the gross sale proceeds from the development scheme, with the plaintiff entitled to 11.8958% of the sale proceeds and the U-Meng companies entitled to 13.1042%. The appellant went into liquidation and the receivers and managers, who were appointed to manage the affairs of the appellant, found that the proceeds of the development scheme were due and owing to the appellant in accordance with the JVA. The appellant's receivers and managers then filed an originating summons against the respondent in the High Court praying for, inter alia, a declaratory order that pursuant to cl 2 of the JVA, the appellant was entitled to receive immediate payment of the proceeds from the development scheme in the proportion of 11.8958%. However, the respondent claimed that whatever payments due to the plaintiff as landowner arising from the sale proceeds from the development scheme was subject to the restrictions under the Housing Developers (Control and Licensing) Act 1966 ('the Act') and the regulations thereunder. The High Court judge held that the appellant's entitlement to the sales proceeds from the development scheme would only be due upon the completion of the development project and thus dismissed the appellant's claim for entitlement for immediate payment of the proceeds from the development scheme. The appellant appealed against this decision and by consent of the parties, the U-Meng companies were granted leave to intervene in this appeal and were named as the second and third appellants ('the appellants'). The Court of Appeal affirmed the decision of the High Court and hence the present consolidated appeal. In this appeal the determination of the three questions posed revolved on the construction of

cl 2.3.1 of the JVA, which involved the appellants' entitlement to payment from the sales proceeds of residential properties under the development scheme. It was the appellants' contention that when the respondent developer received money from the contractor, it should within seven days of receipt of the monies pay the same to the appellants pursuant to cl 2.3.1 of the JVA. The appellants submitted that they should not be subject to the Act because the Act was meant to only protect the house purchasers and not the landowners. The respondent maintained that it had to pay the appellants their entitlement for the residential properties only after the completion of the development scheme.

Held, dismissing the consolidated appeal with costs:

(1) It was the court's duty when interpreting the clauses in an agreement to give effect to the bargain of the parties according to their intention. In the present appeal the words used in the clauses of the JVA, in particular cl 2.3.1, which dealt with the appellants' entitlement to payment from the sales proceeds of residential development, had to be looked into in resolving the issue as to whether the obligation of the respondent to make payment to the appellants as provided for in the JVA was subject to the provisions of the Act. The fact that cl 2.3.1 of the JVA did not contain the key words 'progressive or otherwise' that were found in cl 2.3.2 of the JVA, which involved the appellants' entitlement to payment from the sales proceeds of commercial properties, could only mean that the parties had intended the payment of their entitlement in relation to the residential properties to be deferred and not immediate or progressive (see paras 30–32).

(2) Further, the fact that cl 13 of the JVA referred to the Act showed that the appellants were aware of the requirements of the Act. As such, it would follow that the appellants were also accepting that the monies for the said development should flow through the housing developer account ('the HDA') and that their entitlement could only be realised upon the completion of the project and not before that (see para 34).

(3) The Court of Appeal was correct in its view that the Act was applicable to cases in which the landowner had entered into a JVA with the housing developer to develop the land on a joint venture basis. As such, the JVA was subject to and governed by the provisions of the Act (see para 37).

(4) In any case the appellants as landowners had nothing to lose as the title of the lands that were being developed still remained with them and the respondent could not charge the land to finance the projects. The monies paid by the purchasers would also go into the HAD, which the respondent developer could only withdraw when the project had been

completed or when there was surplus money. On the other hand the respondent developer would lose out if the project was not completed (see para 39).

[Bahasa Malaysia summary

Perayu dan dua syarikat lain, iaitu U-Meng Corp Sdn Bhd dan U-Meng Holdings Sdn Bhd ('syarikat U-Meng'), merupakan pemilik tanah yang telah memasuki perjanjian usaha sama ('PUS') dengan defendan, pemaju perumahan berlesen, untuk memajukan tanah-tanah mereka ('skim pembangunan tersebut'). Fasal 2.3.1 PUS memperuntukkan bahawa perayu dan syarikat U-Meng adalah pemilik tanah yang berhak menerima 25% daripada semua hasil jualan kasar daripada skim pembangunan tersebut, dengan plaintif yang berhak kepada 11.8958% daripada hasil jualan tersebut dan syarikat U-Meng berhak kepada 13.1042%. Perayu telah dibubarkan dan penerima dan pengurus, yang dilantik untuk menguruskan urusan perayu, mendapati bahawa hasil-hasil daripada skim pembangunan tersebut perlu dibayar dan terhutang kepada perayu menurut PUS tersebut. Penerima dan pengurus perayu kemudian telah memfailkan saman pemula terhadap responden di Mahkamah Tinggi memohon untuk, antara lain, perintah deklarasi bahawa menurut fasal 2 PUS tersebut, perayu berhak menerima bayaran segera daripada hasil-hasil skim pembangunan tersebut dalam kadar 11.8958%. Walau bagaimanapun, responden mendakwa bahawa apa-apa bayaran yang perlu dibayar kepada plaintif sebagai pemilik tanah yang timbul daripada hasil jualan skim pembangunan tersebut tertakluk kepada sekatan-sekatan di bawah Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta tersebut') dan peraturan-peraturan di bawahnya. Hakim Mahkamah Tinggi memutuskan bahawa hak perayu terhadap hasil jualan daripada skim pembangunan tersebut hanya perlu dibayar setelah projek pembangunan tersebut siap dan oleh itu menolak tuntutan perayu untuk hak terhadap bayaran segera untuk hasil-hasil daripada skim pembangunan tersebut. Perayu telah merayu terhadap keputusan ini dan dengan persetujuan pihak-pihak, syarikat U-Meng telah diberikan kebenaran untuk campur tangan dalam rayuan ini dan dinamakan sebagai perayu-perayu kedua dan ketiga ('perayu-perayu'). Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan justeru rayuan disatukan ini. Dalam rayuan ini penentuan tiga persoalan yang dikemukakan berkisarkan pembentukan fasal 2.3.1 PUS, yang melibatkan hak perayu-perayu terhadap bayaran daripada jualan hasil-hasil hartanah-hartanah perumahan di bawah skim pembangunan tersebut. Adalah hujah perayu-perayu bahawa apabila responden pemaju menerima wang daripada kontraktor, ia patut dalam tempoh tujuh hari penerimaan wang yang dibayar itu membayar yang sama kepada perayu-perayu menurut fasal 2.3.1. kepada PUS tersebut. Perayu-perayu berhujah bahawa mereka tidak patut tertakluk kepada Akta tersebut kerana Akta tersebut bermaksud hanya utuk melindungi pembeli-pembeli rumah dan bukan pemilik-pemilik tanah. Responden berhujah bahawa ia perlu membayar

perayu-perayu berhak mereka kepada hartanah-hartanah perumahan tersebut hanya selepas skim pembangunan tersebut siap. A

Diputuskan, menolak kesemua rayuan dengan kos:

(1) Adalah kewajipan mahkamah apabila mentafsir fasal-fasal dalam perjanjian memberi kesan kepada tawaran pihak-pihak menurut niat mereka. Dalam rayuan ini perkataan-perkataan yang digunakan dalam fasal-fasal PUS tersebut, khususnya fasal 2.3.1, yang berkaitan hak perayu-perayu kepada bayaran daripada hasil-hasil jualan pembangunan perumahan, perlu diteliti dalam menyelesaikan isu sama ada tanggungjawab responden untuk membuat bayaran kepada perayu-perayu sebagaimana diperuntukkan dalam PUS adalah tertakluk kepada peruntukan-peruntukan Akta tersebut. Fakta bahawa fasal 2.3.1 PUS tidak mengandungi kata-kata kunci 'progressive or otherwise' yang didapati dalam fasal 2.3.2 PUS tersebut, yang melibatkan hak perayu-perayu kepada bayaran daripada hasil-hasil jualan hartanah-hartanah komersial, yang hanya bermaksud bahawa pihak-pihak tersebut telah berniat yang bayaran hak mereka berkaitan hartanah-hartanah perumahan akan ditangguhkan dan bukan serta merta atau progresif (lihat perenggan 30–32). B C D E

(2) Selanjutnya, fakta bahawa fasal 13 PUS merujuk kepada Akta tersebut menunjukkan bahawa perayu-perayu sedar tentang keperluan Akta tersebut. Oleh itu, adalah diikuti bahawa perayu-perayu juga menerima wang untuk pembangunan tersebut patut disalurkan melalui akaun pemaju perumahan ('APP') dan bahawa hak mereka hanya boleh direalisasi setelah siap projek tersebut dan bukan sebelum itu (lihat perenggan 34). F

(3) Pendapat Mahkamah Rayuan adalah betul bahawa Akta tersebut terpakai kepada kes-kes yang mana pemilik tanah telah memasuki suatu PUS dengan pemaju perumahan untuk memajukan tanah berdasarkan usaha sama. Oleh itu, PUS tersebut tertakluk kepada dan dikawal oleh peruntukan-peruntukan Akta tersebut (lihat perenggan 37). G H

(4) Walau bagaimanapun perayu-perayu sebagai pemilik-pemilik tanah tersebut tidak akan kerugian kerana hak milik tanah-tanah tersebut yang sedang dimajukan itu masih kekal dengan mereka dan responden tidak boleh tanah tersebut untuk membiayai projek-projek tersebut. Wang yang dibayar oleh pembeli-pembeli juga akan dibayar kepada APP tersebut, yang mana responden pemaju hanya boleh mengeluarkan apabila projek itu telah disiapkan atau apabila terdapat lebihan wang. Sebaliknya responden pemaju akan rugi jika projek itu tidak disiapkan (lihat perenggan 39).] I

Cases referred to

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69, PC (refd)

Datuk Syed Kecik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257, FC (folld)

Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357, CA (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966 ss 17, 20

Housing Developers (Control and Licensing) Regulations 1989 regs 5(5)(a), 10, 11

Housing Development (Housing Development Account) Regulations 1991 reg 7(k)

Appeal from: Civil Appeal No A-02–168 of 2007 (Court of Appeal, Putrajaya)

Robert Lazar (P Gananathan and Olivia Loh with him) (Gananathan Loh) in Civil Appeal No 02()–39 of 2009(A) for the appellant.

Leong Sai Hwa (Lai Sue Ann and Wong Siang Ping with him) (CK Leong & Co) in Civil Appeal No 02()–39 of 2009(A) for the respondent.

Leong Sai Hwa (Lai Sue Ann and Wong Siang Ping with him) (CK Leong & Co) in Civil Appeal No 02()–43 of 2009(A) for the respondent.

Meyappan Pillai (Alvin Teo Sze Pin with him) (Meyappan Pillai & Associates) in Civil Appeal No 02()–43 of 2009(A) for the appellant.

Hashim Yusoff FCJ (delivering judgment of the court):

[1] There were two appeals before us, viz:

(a) Federal Court Civil Appeal No 02–39 of 2009(A); and

(b) Federal Court Civil Appeal No 02–43 of 2009(A).

At the outset, both counsel agreed that these two appeals be heard together.

BRIEF FACTS

[2] The facts as elucidated before the Court of Appeal are as follows:

> [4] By consent of the parties herein, U-Meng Corporation Sdn Bhd and U-Meng Holdings Sdn Bhd (collectively 'U-Meng') were granted leave to intervene in this appeal
>
> [5] The defendant does not dispute the appointment of receivers and managers ('R&M') for the plaintiff.
>
> [6] The joint venture agreement dated 4 May 1966 ('the JVA') was entered into between the plaintiff, the defendant and U-Meng. The plaintiff is the

owner of a piece of land, with an area of 133 acres. U-Meng is the owner of another piece of land with an area of 147 acres. Pursuant to the JVA, these two pieces of land are to be developed by the defendant, a licensed housing developer, on a joint venture basis for, inter alia, residential properties (a reference hereinafter to a clause is a reference to that clause in the JVA).

[7] Clause 2.1 provides, inter alia, that the two landowners would get 25% of the gross sale proceeds from residential properties. More specifically, the plaintiff would get 11.8958% of all gross sale proceeds from residental properties.

[8] Other clauses, relevant to the instant appeal, viz cll 2.3.1 and 13.1, merit reproduction as follows:

> 2.3.1. In respect of development falling within the Housing Developers (Control and Licensing) Act 1966, the Developer shall appoint Keris Properties Sdn Bhd of No. 31 Jalan AH Pitchay, 30250 Ipoh, Perak as its main contractor and the Developer hereby undertakes to pay to the Landowners the Landowners' Entitlement supported by a statement of the sales and receipts within seven (7) days of receipt of payments by Keris Properties Sdn. Bhd for the Housing Development Account in respect of such development; and
>
> 13. HOUSING DEVELOPMENT ACCOUNT
>
> 13.1. Where the type of development within the Development Scheme falls within the Housing Developers (Control and Licensing) Act 1966, the Developer shall comply with such Act and the regulations thereunder in particular the Housing Development account. The Developer shall be solely responsible for such Housing Development Account which will be operated by the Developer Provided Always the Landowners shall not be liable in any way whatsoever in respect of such Housing Development Account.

[9] The Housing Developers (Control and Licensing) Act 1966, referred to in cll 2.3.1 and 13.1 is now known as the Housing Development (Control and Licensing) Act 1966 ('the Act'). The Housing Development (Housing Development Account) Regulations 1991 ('the Regulations') were made under the Act to regulate the opening, management and maintaining of the Housing Development Account. (The Act, other regulations made thereunder, and the regulations are collectively referred to in this judgment as 'the housing legislation').

[10] The plaintiff has, prior to the appointment of R&M, received advances from the defendant, amounting to RM2.421,681.63 between may and September 2003.

[11] The prayer for residential properties is allegedly based on cll 2.1, 2.3.1 and 13.1 and also the sale and purchase agreements entered into between the plaintiff, the defendant and third parties who are the purchasers of residential properties.

[3] The appellant ('the plaintiff') had filed an originating summons in the Ipoh High Court against the respondent ('the defendant') praying for, inter alia, a declaratory order that pursuant to cl 2 of the JVA, the plaintiff is entitled to receive from the defendant all gross sale proceeds and any other income derived from the development scheme under the JVA in the proportion of 11.8958% in respect of wholly residential properties ('the payment for residential properties').

[4] The learned High Court judge dismissed the prayer for entitlement for payment from the residential properties and held that such entitlement would only be due upon the completion of the development project and release of monies from the Housing Development Account ('HDA').

[5] On appeal, the Court of Appeal affirmed the High Court's refusal to grant a declaratory order in terms of the appellant's (the plaintiff) prayer for entitlement for the residential properties. Hence the present appeal to this court.

[6] In this appeal, three questions were posed, ie:

(a) whether the obligation of the licensed housing developer to make payment to the owner of land as provided for in the joint venture agreement is subject to and governed by the provisions of the Housing Development (Control and Licensing) Act 1966 to the exclusion of the express provisions of the agreement;

(b) whether reg 7(k) of the Housing Development (Housing Development Account) Regulations 1991 will be applicable; and

(c) whether the owner of the land is entitled to be paid the landowners' entitlements in accordance with cl 2.3.1 and other relevant provisions of the agreement entered into between the parties hereto?

[7] On question (a), learned counsel for the appellant referred to cl 2.1 of the JVA dated 4 May 1996 which provides, inter alia:

> 2.1 It is hereby agreed by the parties hereto that the gross sale proceeds and any other income derived from the said Development Scheme (irrespective of whether the development is on U-Meng's Land or Foong Seong Equipment's Land) shall be divided between the parties hereto as follows:
>
> A. In respect of wholly residential development,
>
> (a) Seventy-Five per cent (75%) to the Developer; and

(b) Twenty-Five per cent (25%) to the Landowners in the following proportions:

(i) Thirteen Point One Zero Four Two per cent (13.1042%); derived from 52.4168 x 25%) to U-Meng; and

(ii) Eleven Point Eight Nine Five Eight per cent (11.8958%); derived from 47.5832 x 25%) to Foong Seong Equipment; AND

[8] Further, cl 2.3.1 provides:

2.3.1 in respect of development falling within the Housing Developers (Control and Licensing) Act 1966, the Developer shall appoint Keris Properties Sdn Bhd of No. 31 Jalan AH Pitchay, 30250 Ipoh, Perak as its main contractor and the Developer hereby undertakes to pay to the Landowners the Landowners' Entitlement supported by a statement of the sales and receipts within seven (7) days of receipt of payments by Keris Properties Sdn Bhd from the Housing Development Account in respect of such development;

[9] Relying on cl 2.3.1 learned counsel for the appellant/plaintiff submitted that the appellant is entitled to immediate payment of its entitlements for residential development. It is the appellant's principal argument that the purpose of the housing legislation is to regulate the relationship between a developer and a purchaser and the objective of such legislation does not extend beyond that. Reference was made to the case of *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 which makes it clear that the policy effect of the HDA is to protect house purchasers and regulate developers, and no more.

[10] It was submitted that the Act only applies to the developer and the purchasers and not the landowner (the appellants). Under the HDA, the landowner becomes a party because he remains as the owner of the land, but there is no provision to say that the landowner has to wait until the development is completed before he could get his due for the residential properties.

[11] Learned counsel therefore submitted that the Act does not apply in this particular case because of cl 2.3.1 in the JVA. It was his contention that parties should be free to enter into contracts as they like and that landowners should not be subjected to the Act, since the Act is meant to protect only the house purchasers.

[12] On the facts of the instant appeal, it was submitted that when the developer, ie Keris Properties (PK) Sdn Bhd received money from the contractor ('Keris Properties'), then within seven days, the developer has to pay

A the same to the landowner (the appellant) pursuant to cl 2.3.1 of the JVA.

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B **[13]** The same issues arose in this appeal. Learned counsel for the appellants (U-Meng Corp Sdn Bhd and U-Meng Holdings Sdn Bhd), submitted that these appellants were not parties to the proceedings at the Ipoh High court but were allowed to intervene in the proceedings at the Court of Appeal by consent of all the parties and were named as the second and third appellants therein.

C

[14] He submitted that the U-Meng companies have since the actual commencement of the developments received their entitlements for the residential property development in the manner provided for in cl 2.3.1 of the JVA from the developer, Keris Properties (PK) Sdn Bhd. There has been
D substantial performance. Of the total sums received by the U-Meng companies (RM15,364,231.59), RM13,483,999.95 were for payments of entitlement for residential properties pursuant to cl 2.1.1 of the JVA. The parties had all along acted in reliance of and in compliance of the payment provision of cl 2.3.1. It was stressed that this payment clause was fundamental to the very basis the
E landowners (both the U-Meng companies and the Foong Seong Equipment Sdn Bhd) entering into this venture with the developer Keris Properties (PK) Sdn Bhd, the respondent.

[15] Reference was made to cl 16.1 of the JVA whereby the developer
F covenants that by sub-cll:

> (b) shall not suffer the Landowners to any disadvantage, encumbrance or loss of benefit though the costs, omission, defaults or neglects of the Developer whether wilfully due or otherwise;
>
> G (c) shall duly and punctually perform and observe all its obligations under this Agreement.

[16] It was further submitted that the learned High Court judge made a
H mistake by saying that payment made to Keris Properties ('contractor') was actually payment made to Keris Properties (PK) Sdn Bhd ('developer'). The learned judge held that the defendant (the respondent) was therefore estopped from denying that the plaintiff (Foong Seong Equipment Sdn Bhd) had in fact been paid its entitlement under the JVA.

I Clause 16.1(b)–(c) of the JVA provides:

> 16.1 The Developer hereby covenants that during the continuance of this Agreement, the Developer:
>
> (a) …

(b) shall not suffer the Landowners to any disadvantage, encumbrance or loss of benefit through the acts, omission, defaults or neglects of the Developer whether wilfully done or otherwise;

(c) shall duly and punctually perform and observe all its obligations under this Agreement;

[17] Learned counsel submitted that what cl 2.3.1 states is that the payment of the landowners entitlements was to be made progressively seven days after the contractor had received its payment from the HDA. Keris Properties was the nominated main contractor by Keris Properties (PK) Sdn Bhd, the developer. What had been the fundamental basis for the landowners entering into the JVA was that the obligations to pay the landowners residential payments progressively by the developer was crystallised when the main contractor received its payments from the HDA from the developer. These payment obligations to the landowners (U-Meng and Foong Seong Equipment) were private contractual obligations due from the respondent ('KP' (PK) Sdn Bhd).

[18] It was also submitted that the provisions in the JVA were specific that there is no partnership (see cl 28.1) and that notwithstanding that U-Meng and Foong Seong Equipment Sdn Bhd may have been referred to collectively in the JVA, as the landowners, the rights obligations and liabilities as between all the parties hereto are several and not jointly.

[19] Reference was made to the case of *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357 where the Court of Appeal, inter alia, held:

> (1) it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked at for in the words used unless there were such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court had to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[20] Learned counsel therefore submitted that the HDA has no application to the JVA between the landowners (the appellant) and the developer (the respondent).

[21] Learned counsel for the respondent however pointed out to us that what was alleged to be earlier payments to the landowners previously for the residential payments was incorrect. He submitted that those payments were actually for the commercial properties. From the residential properties, there were three approved phases; namely:

(a) Ibizia;

(b) Giorgio; and

(c) Country and Valentine.

[22] It was submitted that the Ibizia project was completed and therefore monies were withdrawn from the HDA and payments distributed to the landowners.

[23] But the Giorgio and Country and Valentine projects are still not completed. Therefore proceeds of sales from these two projects can only be paid out to the landowners after completion of the said projects and not before.

[24] Learned counsel for the respondent submitted that the developer agree that they have to pay the landowners entitlement for the residential properties, but this is to take place only after completion of the development. This can be seen from the Ibizia phase, where the money was paid to the landowners only after the completion of the Ibizia project.

[25] Reference was made to cl 2.3.2 of the JVA ie regarding the commercial entitlement, whereby the developer shall pay to the landowners in cash upon receipt of payments progressive or otherwise from the purchasers on a monthly basis.

[26] On the meaning of cl 2.3.1, learned counsel submitted that the words used '… and the Developer *undertakes* to pay to the Landowners the Landowners Entitlement. …' denotes that it is dependent on something to take place in the future. In this case it means that the developer agrees to pay only upon the completion of the project. Similarly cl 2.3.2 also carries the words 'progressive or otherwise' which are not found in cl 2.3.1. Learned counsel submitted that this shows that the parties never intended that the developer should have to make immediate payments, progressive or otherwise.

[27] On the issue raised in Question No (b), learned counsel for the respondent submitted that reg 7(k) is not applicable in this case because there was no sale of the land. The developers could not charge the land to finance the project and the landowners still remained as the owner of the land. So the landowners had nothing to lose. It was submitted that the developer can only withdraw from the HDA when:

(a) each phase (eg the Ibizia project) is completed; and

(b) there is surplus money.

[28] Reliance is placed on cll 17 and 20 of the JVA whereby the landowners clearly agreed to be bound by the Act. It was therefore submitted that the

landowners could not agree to be bound by the Act in some parts, but not in other parts.

THE COURT'S FINDINGS

[29] The determination of the three questions posed before us revolves on the construction of s 2.3.1 of the JVA.

QUESTION NO (A)

[30] We agree that it is the court's duty on the interpretation of clauses in an agreement, to give effect to the bargain of the parties according to their intention. Where the bargain is in writing as in this case, the JVA, the words used, in cl 2.3.1 in particular, will have to be looked at unless they are such that one may suspect that they do not convey the intention correctly.

[31] It will be noted that in the JVA, cl 2.3.2 in relation to the payment of commercial entitlement provides:

> In respect of development not falling within the Housing Developers (Control and Licensing) Act, 1966, the Landowners Entitlement shall be paid by the Developer to the Landowners in cash upon receipt of payments (progressive or otherwise) from the purchasers on a monthly basis commencing from the first sale to be paid to the Landowners on or before the 10th day of the following month supported by a statement of the sales and receipts for that month.

[32] However, cl 2.3.1 in relation to the residential/housing development, does not contain the key words 'progressive or otherwise' as found in cl 2.3.2. One can only take this to mean that the parties had intended that the payment of entitlement in relation to the residential properties would be deferred and not immediate or progressive.

[33] It will also be noted that cl 13 of the JVA provides:

> 13.1 Where the type of development within the Development Scheme falls within the Housing Developers (Control and Licensing) Act 1966, the Developer shall comply with such Act and the regulations thereunder in particular the Housing Developer Account (HDA). The Developer shall be solely responsible for such HDA which will be operated by the Developer Provided Always that the Landowners shall not be liable in any way whatsoever in respect of such HDA.

[34] The said cl 13 shows that the appellants were aware of the requirements of the Act. It would follow that the appellants were also accepting that the

monies for the said development must flow through the HDA and that their entitlement can only be realised upon the completion of the project and not before that.

[35] Clauses 17 and 20 of the Act show the covenant by the landowners to be bound by regs 5(5)(a), 10 and 11 of the Housing Developers (Control and Licensing) Regulations 1989.

[36] By virtue of cl 1.2 of the JVA, a minimum of 100 acres of the land (ie about more than 1/3 of the overall development) shall be for commercial and/or residential development. This was to enable the landowners to derive some immediate benefit and allow the flow of cash to them while awaiting the monies from the residential development which they knew would only come upon completion of such development.

[37] The Court of Appeal in the instant appeal was of the view that where the landowner has entered into a JVA with the housing developer to develop the land on a joint venture basis, the Act is applicable. Based on the statutory provisions referred to above, we cannot see anything wrong and agree with the said view of the Court of Appeal. We would answer Question (a) in the affirmative.

QUESTION NO (B)

[38] As there was no purchase of the land for the housing development in this case, reg 7(k) of the Housing Development (Housing Development Account) Regulations 1991 is therefore not applicable. There is therefore no necessity to answer Question No (b).

QUESTION NO (C)

[39] We also agree with the counsel for the respondent's submission that the landowners had nothing to lose as the developer could not charge the land to finance the projects. The monies paid by the purchasers would go into the HDA. But the developer could only withdraw from the said account when the project has been completed or when there is surplus money. Otherwise the developer would have to pay out first to the landowner out of its own pocket since it could not make any withdrawal from the HDA until the project was completed. The developer would tend to lose out if the project is not completed eventually for some reason or other. But the landowner would not lose anything as the title of the lands still remains with them.

Question No (c) is therefore answered in the negative.

[40] In any event, the issues for determination by this court are based on the construction of the relevant clauses in the JVA. It is also noted that learned counsel for the appellant had in the earlier part of his oral submission before us, agreed that the issues were only peculiar to this case. As such it would not really be of public importance. Moreover the Court of Appeal had given its view based on the construction of the various provisions of the JVA (see *Datuk Syed Kecik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257). The grounds given by the learned Dato' Low Hop Bing, JCA are impeccable and we are in agreement with them entirely.

[41] For the above reasons, these appeals are dismissed with costs.

Consolidated appeal dismissed with costs.

Reported by Kohila Nesan